

Editor's note: Appealed -- dismissed, Civ.No. 72-438 PHX CAM (D. Ariz. May 29, 1974); dismissed, No. 74-3122 (9th Cir. Jan. 16, 1976)

H. E. BALDWIN
AND
JOHN R. KEELING

IBLA 71-260

Decided July 30, 1971

Classification of Multiple Use Act Lands

Publication in the Federal Register of a notice of a proposed classification under the Classification and Multiple Use Act will segregate the lands described from other forms of disposal, including appropriation under the mining laws, unless the proposed classification specifically provides that the lands shall remain open for certain forms of disposal, and failure to publish a similar notice in a newspaper having general circulation in the area of the land involved does not negate the segregative effect of the Federal Register publication.

Classification of Multiple Use Act Lands

Mining claims purportedly located after the land has been segregated from appropriation under the mining law by notice of proposed classification under the Classification and Multiple Use Act published in the Federal Register, but before a similar notice is published in an area newspaper, are null and void ab initio, the Federal Register publication having effected a segregation of the land.

Federal Employees and Officers: Authority to Bind Government

Erroneous advice given by personnel of the Bureau of Land Management cannot confer a right not authorized by law.

IBLA 71-260 :

AR 033050

H. E. BALDWIN AND
JOHN R. KEELING

: Mining claims held null
: and void ab initio

: Affirmed

DECISION

H. E. Baldwin and John R. Keeling have appealed from the March 23, 1971, decision of the manager of the Phoenix land office, who held that the Copperhead lode mining claims nos. 1 through 26 were null and void ab initio on his finding that the land upon which the claims were situated was not subject to mineral location.

The area occupied by the claims is in sec. 21 and the NW 1/4 sec. 22, T. 9 S., R. 9 E., G & SRM, Pinal County, Arizona. These lands comprise a portion of a parcel of land aggregating 2,760 acres which in 1963 was classified for disposal to the State of Arizona under the Recreation and Public Purposes Act. 1/ Because of a state statutory limitation on park land acquisitions, the State was unable to immediately acquire the land. In 1966, the land was classified for recreation and public purposes disposal under the terms of the Classification and Multiple Use Act of 1964. 2/ State legislation authorizing the purchase of the lands had not been passed by the fall of 1968, although the concerned state agency continued to assert its interest in and need for the land in connection with the newly created Picacho State Park. To avoid the need for periodic review and renewal classifications, a proposal to classify the lands for multiple use management was published in the Federal Register of December 19, 1968. This publication recited that it had the effect of segregating the lands therein described from all appropriations including locations under the mining law, except as to petition-applications

1/ Act of June 14, 1926, as amended, 43 U.S.C. §§ 869-869-4 (1964).

2/ Act of September 19, 1964, 43 U.S.C. §§ 1411-18 (1964).

filed under the Recreation and Public Purposes Act. However, at the time this action was taken, the Bureau of Land Management, through an oversight, failed to publish notice of the proposed classification in a newspaper having general circulation in the area in the vicinity of the affected land, as required by section 3 of the Classification and Multiple Use Act, 43 U.S.C. § 1412 (1964). This omission was subsequently rectified by publication of the notice of the proposed classification in the Casa Grande Dispatch on December 17, 1969. The notice published in the newspaper stated that publication in the Federal Register had the effect of segregating the land from all forms of appropriation, including location under the mining laws, except for appropriations under the Recreation and Public Purposes Act.

In the interim between the Federal Register publication of the notice and the newspaper publication, the Copperhead lode mining claims nos. 1 through 20 were located by H. E. Baldwin on April 9, 1969. On May 16, 1969, Copperhead claims nos. 21, 22 and 23 were located by H. E. Baldwin, John Keeling, and Bud Driscol. 3/

On June 13, 1970, after the notice was published in the newspaper, Baldwin and Keeling located the Copperhead nos. 1 through 26 lode mining claims, these locations being re-locations of the earlier Copperhead claims.

Meanwhile, the Arizona legislature had approved a bill authorizing purchase of the land under the Recreation and Public Purposes Act for inclusion in the Picacho Peak State Park.

On July 24, 1970, the Arizona State Park Board filed application to acquire the lands. The initial decision of the State Director classifying the lands for disposal under the Recreation and Public Purposes Act was published August 12, 1970. On September 10, 1970, Messrs. Baldwin and Keeling, through their attorney, lodged a formal protest with the Secretary against the initial classification decision under the procedures prescribed in 43 CFR 2462.3 (1971). The matter was referred to the Department for administrative review. The Secretary did not exercise his supervisory authority to vacate the classification, which then became the final order of the Secretary. As such, the propriety of the classification is not subject to review on appeal to this Board.

3/ Bud Driscol has not appealed.

The appellants, citing 43 U.S.C. § 1412 (1964), contend that the Bureau's effort to segregate the land from appropriation under the mining law by publication of the notice of proposed classification in the December 19, 1968, Federal Register was ineffective to bar the subsequent location of the claims because of the Bureau's failure to comply with the statutory requirement that such a notice also be published in a newspaper of general circulation in the area of the land. They assert that the publication of the notice of proposed classification in the Federal Register alone could not and did not close the lands to mineral entry.

It is further stated by the appellants that the Federal Register notice of December 19, 1968, proposed to classify the land for retention in Federal ownership and to close them to mining, but failed to accomplish that "proposed" intention because of the Bureau's failure to publish in a newspaper in the vicinity of the land. It is inferred that a "proposal" to classify cannot accomplish the segregation of the land.

The appellants further assert that subsequent to the initial location of the Copperhead nos. 1 through 23 claims and after they were advised that the lands were closed to such location at the time, their attorney visited the land office where he was informed by a land office employee that the lands were then open to location. It is acknowledged by the land office manager and by the State Director that the attorney actually was given such misinformation. Appellants argue that in reliance on this erroneous information they relocated the Copperhead nos. 1 through 26 claims in June 1970 at considerable effort and expense. However, they insist that they were not misled thereby, because the lands actually were open to the location of claims.

Finally, appellants attack the propriety of the classification itself, alleging that the land has no value for park purposes but is most valuable for mineral development. As noted above, these allegations were presented in connection with the protest filed in accordance with the review procedure prescribed in 43 CFR 2462.3, supra. The initial classification order has become the final order of the Secretary. The propriety of the classification action, therefore, is not a justiciable issue in the consideration of this case.

The principal issue is whether the Bureau's failure to publish the notice of proposed classification in an area newspaper prior to the location of the claims constituted a fatal defect in the Bureau's efforts to segregate the land from appropriation under the mining laws by publication of the Federal Register notice on December 19, 1968.

The salient provisions of the Classification and Multiple Use Act, 43 U.S.C. (1964), provide:

§ 1412. Publication of notice.

At least sixty days prior to taking the following action the Secretary of the Interior or his designee shall give such public notice of the proposed action as he deems appropriate, including publication in the Federal Register and in a newspaper having general circulation in the area or areas in the vicinity of the affected land:

(a) Classification for sale or other disposal under any statute of a tract of land in excess of two thousand five hundred and sixty acres.

§ 1414. Exemption of lands from other forms of disposal; time period; continuation beyond period.

Publication of notice in the Federal Register by the Secretary of the Interior of a proposed classification under this subchapter shall have the effect of segregating such land from settlement, location, sale, selection, entry, lease, or other formal disposal under the public land laws, including the mining and mineral leasing laws, except to the extent that the proposed classification or subsequent notification thereof specifies that the land shall remain open for one or more of such forms of disposal under the public land laws. The segregative effect of such proposed classification shall continue for a period of two years from the date of publication unless classification has theretofore been completed in accordance with the provisions of this subchapter and the regulations to be promulgated hereunder, or unless the Secretary of the Interior shall terminate it sooner. . . .

Clearly the statute envisages publication of a notice of a proposed classification in a newspaper in addition to a notice in the Federal Register at least 60 days before effecting a final classification of the land. However, there is no requirement that these actions be simultaneous. But while a classification itself may be deficient because of failure to follow the prescribed procedure in every aspect, the statute states that publication of

the notice of a proposed classification in the Federal Register will accomplish the segregation of the land from appropriation. No other act is required for that purpose. Therefore, the failure to publish a notice in the newspaper concurrently did not negate the segregative effect of the notice published in the Federal Register on December 19, 1968, and the lands were thereby closed to mining location at the times of the purported locations of the Copperhead claims.

The fact that the classification was merely proposed at the time of publication does not impair the segregative effect, as it is precisely such proposed classifications which are contemplated by the statute and by the regulations in 43 CFR Part 2460 (1971).

Erroneous advice given by personnel of the Bureau of Land Management cannot confer a right not authorized by law. 43 CFR 1810.3; Southwest Salt Co., 2 IBLA 81 (1971).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Edward W. Stuebing, Member

We concur:

Anne Poindexter Lewis, Member

Frederick Fishman, Member

